

IN THE DISTRICT OF THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DANE HARREL, et al.,

Plaintiffs,

v.

KWAME RAOUL, et al.,

Defendants.

Case No. 23-cv-141-SPM

FEDERAL FIREARMS LICENSEES OF
ILLINOIS, et al.,

Plaintiffs,

v.

JAY ROBERT "J.B." PRITZKER, et al.,

Defendants.

Case No. 23-cv-215-SPM

CALEB BARNETT, et al.,

Plaintiffs,

v.

KWAME RAOUL, et al.,

Defendants.

Case No. 23-cv-209-SPM

JEREMY W. LANGLEY, et al.,

Plaintiffs,

v.

BRENDAN KELLY, et al.,

Defendants.

Case No. 23-cv-192-SPM

Transcript of Oral Argument - Volume I
April 12, 2023

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April 12, 2023

Proceedings held in person before
the Honorable **STEPHEN P. McGLYNN**,
United States District Judge Presiding

East St. Louis, Illinois

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TRANSCRIPT OF PROCEEDINGS

(Proceedings commenced at 1:28 p.m.)

THE COURTROOM DEPUTY: United States District Court for the Southern District of Illinois is now in session, the Honorable Stephen McGlynn presiding. You may be seated.

Court calls Case Number 23-cv-209, Caleb Barnett, et al., v. Kwame Raoul, et al. Case is called for oral arguments. Parties, if you would please identify yourselves for the record.

MS. MURPHY: Erin Murphy on behalf of the Barnett plaintiffs.

MR. MICHEL: Chuck Michel on behalf of the Illinois FFL plaintiffs.

MR. SIGALE: Good afternoon, Your Honor. David Sigale, S-i-g-a-l-e, on behalf of the plaintiffs in the Harrel case, 141.

MR. MAAG: Thomas Maag on behalf of the Langley plaintiffs.

MR. OWENS: Your Honor, Troy Owens. I represent State's Attorney Patrick Kenneally and Sheriff Rob Tadelman as part of the Harrel defendants.

MR. WELLS: Good morning, Your Honor. Good afternoon, Your Honor. Christopher Wells on behalf of the state-level defendants, the attorney general, the governor, and the director of the Illinois State Police.

1 MS. HUNT MUSE: Good afternoon, Your Honor.

2 Katherine Hunt Muse on behalf of the state defendants.

3 MS. BAUTISTA: Hello, Your Honor. Laura Bautista
4 also on behalf of the state defendants.

5 MR. YSURSA: Good afternoon, Your Honor. Thomas
6 Ysursa on behalf of St. Clair County State's Attorney James
7 Gomric and St. Clair County Sheriff Richard Watson in the Harrel
8 case.

9 THE COURT: Good afternoon to all of you.

10 MR. LOTHSON: Your Honor, Andrew Lothson on
11 behalf of the Barnett plaintiffs.

12 MR. HILL: Good afternoon, Your Honor. Keith
13 Hill on behalf of Cole Shaner, Crawford County State's Attorney.

14 MR. DOLAN: Your Honor, Sean Dolan on behalf of
15 Jarrod Peters and Jeremy Walker.

16 THE COURT: Anybody else?

17 This is a very important case. Julie, would you
18 put up that picture? You can take it down. How many of you saw
19 a duck? How many of you saw a bunny rabbit? Put up the other
20 one. How many of you see a young woman? How many of you see an
21 older woman? Same picture, but we interpret it very much
22 differently. Take it down.

23 In art, they call that aspect. People refer to
24 that as optical illusions. But what happens is, when we see
25 things, our mind immediately tries to make order out of the

1 chaos of what we're seeing, and so we are trying to group things
2 together logically in our own minds. And so if you had a test,
3 half of you would say, well, that's a duck. Why don't you put
4 the duck head back up? So if you consider the bills of the duck
5 to be the ears of the rabbit, then it's very easy to tell, oh,
6 yeah, I could see -- or people could look at the very same
7 picture and see the head of a rabbit.

8 In my experience, these firearm cases -- you can
9 take it down -- have a lot of the same things. People look at
10 mass shootings, they look at gun cases, and some people are
11 zeroed in and focused on the guns. Other people might be
12 looking at victims. They might be looking at the perpetrator.

13 We have people here and there's some people
14 downstairs watching, law-abiding citizens that own guns, guns
15 that these laws seek to forbid, and they've done nothing wrong
16 and nor will they. And you have people watching who feel very
17 strongly that these guns represent a serious problem to society
18 and they need to be banned.

19 When you're looking at the same picture and we're
20 organizing in our own minds differently, it would be foolhardy
21 not to acknowledge that there are those who seek out these very
22 weapons to do senseless evil acts. They select some of these
23 weapons in particular to secure a higher body count, carnage of
24 the innocent so as to appease some demanding demonic impulse or
25 some ghoulish trophy as part of some very troubled mind.

1 So I ask each of you -- and there may be people
2 here because they've lost loved ones to gun violence. So I ask
3 each of you to look at the people around you and understand that
4 they may see things entirely different than you do. Their minds
5 are trying to construct the same fragments of information that
6 we are. And they may feel entirely different about things than
7 you do, but we are fellow citizens and we want to treat each
8 other with respect.

9 When you're a trial judge, people ask what it's
10 like to be a trial judge. I say you get to meet the mothers.
11 You get to meet the widows of gun violence. You get to meet the
12 mothers of those who are killed in gun violence. And then you
13 get to meet the mothers of some young troubled kid who committed
14 terrible acts. It's a very human -- it's a very human endeavor.

15 The higher we get up the food chain in cases, the
16 more the -- it becomes maybe less of a human drama, but make no
17 mistake about it, in the end, this is really about the people
18 involved. My job is to keep an open mind, to listen to
19 everybody. I've not made up my mind in this case, I look
20 forward to oral arguments. It's not my job -- in fact, I cannot
21 make policy decisions with respect to guns. My job is to make
22 sure that the policy decisions of the legislative branch and the
23 executive branch are consistent or permitted by the
24 Constitution, nothing more than that, but certainly nothing less
25 than that.

1 And so I'm going to ask both sides a series of
2 questions. Don't try to read into my questions that I judge one
3 thing one way or the other. I'm probing to test the strengths
4 of the various arguments. I've had to read a lot of paperwork
5 in this case. This is the submission of the state of Illinois.
6 I now know that I could take on Tolstoy in War and Peace and
7 make my way through it. But there's a lot of really great legal
8 scholarship that has gone into the presentations by all the
9 parties in this case.

10 And so with that, we will start oral argument.
11 The plaintiffs, who are seeking to secure a temporary
12 restraining order, secure some injunctive relief to prevent the
13 enforcement of this statute, will have one hour of argument.
14 They've decided that they'll divide their time 45 minutes in
15 their initial address to the Court and reserve 15 minutes for
16 rebuttal. Government will have one hour.

17 I understand there's a lot of lawyers here, and I
18 may ask a question that might be better answered by one of the
19 other lawyers that is not speaking. I have no problem with
20 counsel deferring to co-counsel or other counsel in this case to
21 address specific questions that I have.

22 All right. The -- I'd ask that you come to the
23 podium, but as long as I can hear you, I'm fine. So if the
24 spirit moves you and you want to walk around and swing your arms
25 around, that's all right with me. You're not frozen or affixed

1 to this podium.

2 With that, counsel?

3 MS. MURPHY: Thank you, Your Honor. Again, Erin
4 Murphy on behalf of the Barnett plaintiffs. And while I
5 represent the Barnett plaintiffs, I will be presenting argument
6 on behalf of all the plaintiffs with the caveat, as Your Honor
7 suggested, that I may welcome the opportunity, if you have a
8 particular question that's a little more factual or outside of
9 what I am prepared to talk about, to invite one of my many
10 counsel at the table to jump in.

11 So there are a lot of difficult policy questions
12 of course about firearms, but after the Supreme Court's decision
13 in *Bruen*, we think the legal analysis here of the
14 constitutionality of this law is quite straightforward. We know
15 from *Bruen* how Courts are supposed to analyze challenges to laws
16 that implicate the Second Amendment. First, Courts ask whether
17 the conduct in which the plaintiff seeks to engage is covered by
18 the plain text of the Second Amendment. If it is, then it's
19 presumptively protected by the Second Amendment, not
20 necessarily -- that's not the end of the analysis, but it's
21 presumptively protected and the burden shifts to the government
22 to come forward and prove that the law that it wants to impose,
23 the restriction it wants to have, is consistent with our
24 nation's historical tradition.

25 Now there are some aspects of Second Amendment

1 law where the Supreme Court has not yet spoken that much as to
2 exactly how that test works. But when it comes to the question
3 of which arms are protected, that is not one of them. The
4 Supreme Court has squarely answered the question both of what
5 the definition of arms means and of what the historical
6 tradition in this country is as to which types of arms that
7 presumptively fall within the scope of the Second Amendment are
8 protected.

9 So let's start with the textual question of
10 whether we're talking about something protected by the Second
11 Amendment. The Supreme Court first articulated back in *Heller*
12 and reiterated in *Bruen* that the definition of arms is quite
13 straightforward and pretty capacious. It simply means anything
14 that constitutes bearable arms. The language the Court most
15 recently used in *Heller* is that it covers all instruments that
16 facilitate armed self-defense. So by its terms, that
17 straightforward textual question simply asks, is what we're
18 talking about something that people would bear for the purpose
19 of engaging in self-defense.

20 When it comes to this case, I don't think that's
21 a particularly difficult question. We have a law that, by its
22 terms, prohibits the possession of rifles, pistols, and shotguns
23 just because of particular features with which they are
24 equipped. Now a rifle, a pistol, a shotgun doesn't become any
25 less of a bearable arm because it has a pistol grip or a

1 thumbhole stock or --

2 THE COURT: What about a grenade launcher?

3 MS. MURPHY: I think as a matter of whether it is
4 textually prima facie within the scope of the Second Amendment,
5 it's still a bearable arm. We're going to have a very different
6 analysis when it comes to historical tradition on grenade
7 launchers, but as to that threshold question of simply whether
8 it's an arm, a firearm equipped with a grenade launcher is a
9 bearable arm for self-defense. It's prima facie protected by
10 the Second Amendment.

11 THE COURT: Well, it shoots an explosive or
12 launches an explosive instead of shoots a projectile, isn't that
13 different?

14 MS. MURPHY: I don't think the Supreme Court has
15 really drawn a distinction based on exactly how the arm fires or
16 what it does for purposes of that threshold textual inquiry.
17 Again, once we get to historical tradition and the question of
18 whether it's something people commonly possess for lawful
19 purposes, that makes a huge difference. You know, grenade
20 launchers have never been something -- that I'm aware of any
21 tradition of them being commonly possessed by law-abiding
22 citizens for lawful purposes, and that's why we're not here
23 challenging the provision of the law that says that you can't --
24 that prohibits arms that are equipped with grenade launchers.
25 Grenade launchers were already unlawful before this.

1 But I think it's really important as a legal
2 matter, you know, I think the state has tried to conflate these
3 two parts of the analysis and sneak into that threshold textual
4 question, things that the Supreme Court has told us really speak
5 more to the second part of the inquiry that focuses on
6 historical tradition.

7 So at that first part, when you're simply asking,
8 you know, does -- is this an arm, is this a bearable arm, it's
9 really just as simple as, is this something that people pick up
10 and use for the purpose of engaging in armed self-defense. And
11 again, as to what we're talking about here, I just -- you know,
12 the first question, if you're focused on the so-called assault
13 weapon part of this, I don't see how there's really any argument
14 to be made that a rifle or a pistol or a shotgun is no longer a
15 bearable arm because it has the particular features that the
16 state has singled out.

17 And I don't think the analysis is any more
18 complicated when it comes to the aspect of the law that
19 prohibits the magazines, because magazines are not mere
20 accoutrements or accessories in the manner that the state has in
21 mind. When you look historically at what was put into the
22 bucket of accoutrements or accessories, it's things like a
23 scabbard or cartridge box. Those are things that you use to
24 store your arm or ammunition when you're not using it, when
25 you're not bearing it for self-defense. Nobody kind of affixes

1 their cartridge box to the arm once they're utilizing it for
2 self-defense.

3 Magazines are of course quite different. Sure,
4 they hold ammunition, but my clients and the many clients who
5 are being represented here today don't want to possess the
6 magazine just for the sake of possessing the magazine or having
7 somewhere where they can keep ammunition. They want to possess
8 a magazine so that they can have arms that are equipped with the
9 magazine that they bear for self-defense and other lawful
10 purposes.

11 And I think when we're talking about that
12 threshold inquiry into what the text of the Second Amendment
13 protects, as long as you're talking about something that is an
14 operative part of the firearm -- it doesn't have to be
15 absolutely essential, critical, you could never have a firearm
16 that doesn't have this particular feature -- as long as you're
17 talking about something that is an aspect of what enables the
18 firearm to operate the way the user intends it to operate, then
19 whether you're talking about that as a fixed component or as a
20 detachable component really makes no difference.

21 And the state doesn't seem to really think it
22 makes a difference because they prohibit the magazines
23 regardless of whether they're detached or fixed, which just kind
24 of goes to show that the focus here is not on magazines qua
25 magazines. You know, it's the state wants to regulate them

1 because people use the magazines as part of the firearms. And
2 all of that for purposes of that textual threshold inquiry just
3 reenforces the conclusion that this isn't, you know, a tricky
4 question. The part about whether this is an arm that is
5 presumptively protected is really answered by the mere fact that
6 this is a law that, by its terms, is designed to say there
7 are -- there are some types of arms that people can't carry.

8 THE COURT: Do you think *Bruen* put into question
9 all of our laws, both state and federal, that regulate what
10 firearms can be possessed or used, or do you think that there
11 are, as Justice Kavanaugh put out, that stated, this doesn't
12 bring into question many of the arms -- many of the laws we
13 have, felon in possession, for instance? So do you think it
14 changes what's already in place?

15 MS. MURPHY: I think what it does -- I don't
16 think it calls into question every conceivable ban on a
17 particular type of arms, because there is of course a critical
18 second part of the analysis. Once something is textually an
19 arm, that means it's presumptively protected. It's prima facie
20 protected in the words that *Heller* used back when it articulated
21 the test. But that doesn't end the inquiry. It shifts the
22 burden to the state to demonstrate that the regulation is
23 consistent with historical tradition.

24 But *Bruen* has also answered the question of what
25 the historical tradition is, and it answered it in a way that I

1 think leaves room for, you know, some types of prohibitions are
2 going to be permissible and some aren't, because what the
3 test -- the historical tradition test asks is whether arms are
4 in common use, whether they are commonly possessed by
5 law-abiding citizens for lawful purposes, like self-defense.

6 Not everything that qualifies as an arm in the
7 prima facie sense satisfies that test. I think grenade
8 launchers are a perfect example. They may well be arms in the
9 sense that you can pick one up and bear it, but they are not
10 something that in the history of our country I'm aware of
11 anything showing have ever been commonly possessed by
12 law-abiding citizens for purposes like self-defense.

13 THE COURT: How about a .50 caliber rifle?
14 Nobody really -- nobody really picks that up and shoots it from
15 their shoulder. It's just massive.

16 MS. MURPHY: We did not challenge the provision.
17 I'm not --

18 THE COURT: All right.

19 MS. MURPHY: I can't speak -- I'm not sure if
20 there's anybody at the table that did, but my clients didn't
21 challenge the .50 caliber. We didn't challenge it, so I'm not
22 going to stand up here and say I've -- can tell you precisely
23 what the statistics are. But if we had, I think the right
24 thing -- the state could come forward and say, here's our
25 evidence that people don't possess those, and maybe they'd be

1 able to make a better showing in that case. Maybe they would,
2 maybe they wouldn't.

3 THE COURT: All right. At the break, we'll see
4 if somebody -- I'll give one of the other lawyers a chance to
5 address .50 caliber.

6 So the right to bear arms under the Second
7 Amendment refers to the right to wear, bear, or carry upon the
8 person or in the clothing or in a pocket for purposes of being
9 armed and ready for offensive or defensive action in the case of
10 a conflict with another person, so says the Supreme Court. And
11 also they refer to arms that are typically or commonly
12 possessed.

13 So what number are we looking for that moves the
14 firearm from being in some odd lot to being so widely held that
15 it's considered typically possessed?

16 MS. MURPHY: So I think, you know -- I mean,
17 the -- from my standpoint, once you're in the millions, it's an
18 easy question. If you go back to *Caetano*, Justice Alito
19 indicated that a couple hundred thousand individuals possessing
20 stun guns was sufficient to render those arms in common use.
21 But certainly when you're in the neighborhood of things that are
22 owned in the millions, or here, we're talking about tens of
23 millions or even hundreds of millions, when it comes to the
24 types of magazines the state has prohibited, you know, that
25 strikes me as, wherever the line is, we've far surpassed where

1 the line -- where you would draw the line of saying something
2 is, the language of the Supreme Court, highly unusual in society
3 today. I mean, we offered some examples in our own briefing of
4 the number of, you know, AR platform rifles in existence exceeds
5 the number of F-Series trucks on the road, which I don't think
6 anyone thinks of as things that are highly unusual in society
7 today.

8 So commonality, you know, sure, they're less
9 common if your comparator is handguns, which are the most common
10 right now type of arms on the market. But even if you take a
11 look at some of the statistics comparing the two, you know, the
12 recent statistics that my client NSSF gathered through the
13 research, and it regularly does with retailers, is that AR
14 platform rifles are the number 2 top seller at this point. You
15 know, it's about 44 percent is handguns and second behind that
16 is about 20 percent of what is sold on the market, is purchased
17 on the market right now is AR platform rifles. Yet they've been
18 completely --

19 THE COURT: There's no question that AR platform
20 rifles are commonly held, typically held, but does that platform
21 allow in, say, AK-47s, which may not be typically or commonly
22 held?

23 MS. MURPHY: So I think, you know, this is where
24 it's really critical that the burden shifts after we're past the
25 textual analysis.

1 THE COURT: I'm asking that question too.

2 MS. MURPHY: Sure. And what I would say is, you
3 know, I think that the burden is on the state to -- if -- you
4 know, they had kind of a couple choices in how to defend this,
5 and one would have been to say, look, maybe we -- maybe we swept
6 a little too broadly by bringing in these AR-15 platform rifles,
7 given that they are just exceptionally common these days and
8 people choose them for all sorts of lawful purposes. But let us
9 tell you, Your Honor, about, you know, how there are still some
10 things here that we think we can make our showing as to why
11 they're not common.

12 That is not how I understand them to have
13 defend -- tried to defend this case. They want to defend this
14 law on an all-or-nothing basis, which is certainly their
15 prerogative to do, but their arguments have not been geared
16 towards saying, hey, on our list of a hundred firearms, you
17 know, maybe 95 of them we're wrong about, but let us tell you
18 about the five that we actually don't think people own. You
19 know, this is the preliminary stage, if later in the case they
20 want to try and shift the record and focus on particular arms, I
21 suppose that's still their prerogative to do, but they haven't
22 come forward that way and this really is their burden. Since
23 these are arms, it is their burden to demonstrate that what
24 they've banned is not something that's commonly possessed.

25 And the other problem they have is, you know,

1 because of the way this law operates, yes, you have this list
2 that identifies particular arms, you could have a conversation
3 about the arms on it, but you also have a features ban, and the
4 features ban identifies features that we certainly don't believe
5 there's any category there other -- with the exception of the
6 grenade launchers that you could say, as a categorical matter,
7 every arm that has that feature is unusual, dangerous and
8 unusual and not something that's commonly possessed. By and
9 large, those are features that are common on things like an AR
10 platform rifle.

11 And so because of the nature of, you know, having
12 a features definition that sort of sweeps in a lot of stuff, I
13 don't think -- I think the state has to be able to defend the
14 features themselves as, that's a feature that any firearm that
15 possesses is highly unusual in society today, and that's just
16 not a showing that they've -- that I think -- I mean, we're the
17 ones who have come forward with evidence, not them, about
18 commonality. But really, their arguments here have not been
19 like, you're wrong about the numbers. I think most of our
20 disputes are really legal disputes about what it is that needs
21 to be shown, what -- you know, what qualifies as commonality as
22 sort of a legal matter, what qualifies as common use as a legal
23 matter, and what goes into which piece of the analysis.

24 THE COURT: Well, let's talk about the -- the
25 magazines. Is there a number -- I mean, I understand your

1 position about the government's burden. Is there a limit to how
2 large a magazine can be for the AR-15 platform before it gets
3 into a realm where a government could regulate it and say,
4 that's just way too much?

5 MS. MURPHY: Sure. So I wouldn't say there's
6 like a number I can tell you, this is -- you know, the
7 constitutional cutoff is X. I think as a practical matter,
8 there ends up being a cutoff because -- as a consequence of the
9 constitutional test, which is, what things are actually commonly
10 owned by people for lawful purposes like self-defense. And, you
11 know, while there's not a record amassed on this at this point,
12 you know, my understanding is, while hundred-round drums are
13 legal in many states, they are not something that is commonly
14 owned by a heck of a lot of people who are just possessing
15 weapons for self-defense purposes. So there is -- the test the
16 Supreme Court has articulated that focuses on common use builds
17 in results that are going to impose limitations on what can be
18 used.

19 And one good historical illustration of that is
20 the difference between the regulatory treatment of automatic and
21 semiautomatic firearms. I mean, if you go back in time, you
22 know, the state has all of these concerns about, oh,
23 manufacturers just flood the market and that renders this test
24 meaningless. That's pretty much what manufacturers tried to do
25 with machine guns in 1925 when they first came up with the

1 submachine gun that could actually be carried around the 1920s.
2 It was for the military. The military didn't really want it and
3 they said, we'll sell it to civilians, we've got all these
4 firearms. And it turned out, civilians didn't really want them
5 either. They really found a home very quickly with people who
6 were misusing them in kind of gangster crimes and such. And
7 within two years, the majority of states were prohibiting that
8 technology.

9 Now at the same time, the states were actually
10 being quite careful not to sweep in semiautomatic technology,
11 even though semiautomatic arms had been on the market for
12 several decades. They had actually come on the civilian market
13 well before automatic technology did. But I think it's a really
14 powerful illustration. You know, there's this common critique
15 of, oh, if you have a test that focuses on common use, it's just
16 never -- it's completely indeterminate and it's controlled by
17 the manufacturers because they dictate the choices about what
18 people want to purchase. That just hasn't proven true over
19 time.

20 We've seen things that come on to the market and
21 don't actually find much of a home with people who are
22 purchasing arms to keep and bear for self-defense, whether
23 that's because, you know, at a certain point, a firearm just
24 becomes sort of unwieldy, some of these types of devices that
25 get into much higher numbers of rounds are less reliable,

1 whatever the reason may be. People actually do make choices and
2 they don't just let their lives be dictated by, you know, we put
3 something on the market and therefore you must need it. So this
4 test is proven to be one where there are choices made by people
5 and there is content to it and you do end up with, there are
6 some things that, even though they're legal in many states, are
7 just not the types of things that find the same kind of home in
8 the civilian marketplace. But the problem the state has here
9 is, that's just not the type of things we're talking about here.

10 THE COURT: So the -- sticking with the machine
11 guns in the '20s, they were banned because they were principally
12 weapons of bootleggers and bank robbers as opposed to common
13 citizens as opposed to banning them because they could fire --
14 they were capable of firing large, powerful bullets and have
15 multiple impact capacity, so that in a very short period of
16 time, they could spread a lot of lead that hits a lot of people
17 in a very dangerous way? You think it was just because of the
18 gangsters and the bootleggers using them as opposed to the fact
19 that they were shooting typically larger rounds with higher
20 capacity and causing multiple impacts per person?

21 MS. MURPHY: I think it's predominantly what it
22 was. And part of that to me -- the fact that you have states
23 drawing a distinction at the time between semiautomatic and
24 automatic technology, what they're focussing on, the things that
25 they're really focusing on in those laws, and if you look at the

1 laws, for instance, that the state has put in its Table 4 in its
2 appendice of trying to produce historical laws, when you look at
3 those laws, they're really almost -- most of them are regulating
4 almost automatic firearms. And what they single out, the
5 defining feature is that they continue to fire with one pull of
6 the trigger.

7 And that's what, you know, I think people viewed
8 at the time. And our regulatory scheme has since -- has since
9 treated that ever since differently. And the Supreme Court
10 treated that differently in *Staples* and then again in *Heller*
11 when it was distinguishing the old *Miller* case that had upheld
12 the ban. What the Court focused on is, you know, that's a
13 different type of technology. And it's not just because it's a
14 different type of technology, it's a different -- the
15 preferences of the people followed from it being a different
16 type of technology, that instead of -- you know, typically what
17 we see people gravitating toward is arms that fire more
18 accurately, more quickly, and more rounds, and instead, you've
19 got an arm that, certainly in its early iterations -- I mean,
20 the idea behind automatic technology was to pull with one
21 trigger and keep firing and to fire rather indiscriminantly.
22 That's why they started for decades as weapons that were used on
23 the battlefields and weren't initially something that was
24 designed for self-defense.

25 And I think you see that you have people's

1 preferences follow, that that's not what people go out and
2 decide, hey, I really want to keep a sawed-off shotgun in my
3 house, because it's not really what people are thinking about,
4 when they're instead consistently gravitating towards
5 advancements in technology that just make it easier to fire
6 their firearms more accurately. That's all we're talking about
7 here.

8 The things that the state has singled out, you
9 know, the state wants to talk quite a bit about lethality and
10 all that, but if you set aside the .50 caliber issue, which we
11 haven't challenged, the features we're talking about that the
12 state has used to define something as an assault weapon, they
13 aren't features that have any impact on the lethality of the
14 firearm if the ammunition hits its intended target. I mean, an
15 AR platform rifle that fires with the same ammunition will cause
16 the same damage, whether or not it has a pistol grip or a
17 particular type of stock or is equipped with, you know, a flash
18 suppressor. Those are just things that make it easier for the
19 person who's utilizing the firearm to use it accurately and,
20 yes, to fire the next shot accurately if their first one isn't
21 successful.

22 Now of course those are features that if you are
23 the rare person who wants to use firearms for horrific purposes
24 and cause absolute mass destruction, yes, they are going to make
25 it easier to do that. But conversely, they are absolutely the

1 features that if you're the law-abiding citizen who wants to
2 defend yourself against somebody who's coming at you who's armed
3 and wants to do you harm, of course you want a firearm that you
4 can fire most accurately, and in the event that you don't fire
5 perfectly the first time under the stress of a self-defense
6 situation, that you're going to have a better chance of hitting
7 your target the second time or the third time or whatever it may
8 be.

9 And that's why we see law-abiding citizens
10 continue to purchase these types of arms, why we see that at
11 this point, the latest statistics from -- not just from, you
12 know, my client -- and I know the state likes to say nothing
13 NSSF does should count, but also from the study done by
14 Professor English at Georgetown, all of these statistics
15 demonstrate that when you're talking about the magazines the
16 state has banned -- I mean, it's at least like half the
17 magazines in this country at this point. People are commonly if
18 not predominantly choosing to have magazines that have the
19 capacity that the state has deemed too large.

20 That's not because millions and millions and
21 millions of gun owners in this country actually are stockpiling
22 weapons because they plan to go and commit horrific crimes with
23 them. It's because many law-abiding citizens, perfectly
24 reasonable people who choose to exercise their right to keep and
25 bear arms, believe that that is what's best for them to have for

1 lawful purposes like self-defense in their home.

2 And from our perspective, you know, once you've
3 established that commonality test, once -- I mean, and frankly,
4 it's really once the state has failed to meet its burden of
5 proving that something is not typically possessed by law-abiding
6 citizens for lawful purposes, that's the end of the inquiry.
7 That is the test. The Supreme Court has already told us, it's
8 done the hard work in this particular context. *Bruen* says the
9 historical tradition is that the people get to keep the arms
10 that are in common use for lawful purposes like self-defense.
11 So you don't have to go and say, well, wait, let's do a
12 historical inquiry as to whether those arms were common a
13 hundred or 200 years ago or whether someone used to ban them,
14 even though today they're actually common.

15 The Supreme Court, I mean, if you can go back to
16 *Heller* the Supreme Court addressed as quote, bordering on
17 frivolous, the argument that the Second Amendment protects only
18 those arms that are in existence or common at the time of the
19 founding, surely the same reasoning applies whether you think
20 ratification of the Second Amendment or the Fourteenth Amendment
21 is the relevant point.

22 The Court then reiterated that in *Bruen*. And
23 particularly notable discussion in *Bruen*, the Court specifically
24 confronted the argument of, what if you're talking about an arm
25 that's common today but would have been viewed as dangerous and

1 unusual a hundred or 200 years ago? And the Court specifically
2 addressed that argument and said, even if, even if the state
3 could prove that handguns would have been considered dangerous
4 and unusual back at the time of the founding, that wouldn't
5 matter, because the historical tradition is what's in common use
6 today is something that is what the people are entitled to keep
7 and bear, and if societal norms have shifted such that
8 technology developed in a way where what once seemed scary has
9 become actually, you know what, this works a heck of a lot of
10 better than a musket and we'd all be better off if we have
11 firearms that we know would fire more accurately and cause less
12 unintended damage, you know, if societal norms and technology
13 shift in a way that makes something more attractive to
14 law-abiding citizens for self-defense, that's what matters under
15 the historical tradition test. You don't freeze in time the
16 inquiry of, you know, what would the average farmer in 1789 have
17 thought if handed a modern day handgun about the utility of that
18 firearm.

19 THE COURT: Well, there's no question that at the
20 time our Constitution and the Bill of Rights was ratified, that
21 people possessing mechanisms that were hand held that could fire
22 projectiles were common, so too were mechanisms that were held
23 to the shoulder that had a longer barrel that fired projectiles.
24 I don't have any question about that.

25 However, they weren't the type of weapons that

1 could, you know, quickly cause the death of 20 people. I mean,
2 200 years ago, if you wanted to cause the quick death of people,
3 it had to be a group of people getting together and say, let's
4 do this.

5 So because that wasn't the case with firearms at
6 the time the Constitution was ratified, the legislatures today,
7 are they just -- they're prohibited from confronting the kind of
8 gun violence that we have today that just was not even conceived
9 of 200 years ago?

10 MS. MURPHY: I think that they are restricted in
11 their ability to confront that violence by saying, we're going
12 to prohibit law-abiding citizens from possessing arms that are
13 commonly -- in common use for lawful purposes. That doesn't
14 mean they're powerless to do anything to address the very, very
15 serious concerns both about gun violence generally and about the
16 use of these and other types of firearms to commit mass
17 atrocities.

18 Certainly you can have -- work to craft the best
19 laws possible to keep these arms out of the hands of people who
20 will misuse them. You can certainly craft laws designed to
21 ensure that everybody is as prepared as possible in the event of
22 a situation where firearms are utilized a certain way. The
23 state has great leeway to impose back-end, you know, strong
24 deterrents in terms of sentencing and all of that for the misuse
25 of firearms. There are many, many things the states can do.

1 But the one thing that, you know, the Second
2 Amendment is there to guard against is the state disarming
3 law-abiding citizens. And the historical tradition is that they
4 can't disarm law-abiding citizens vis-a-vis arms that
5 law-abiding citizens commonly choose to possess for lawful
6 purposes, so --

7 THE COURT: So the state has many options, but
8 one option is not taking away guns from law-abiding citizens.
9 Second Amendment says, look for other options, other ways to
10 address the problems that you have?

11 MS. MURPHY: That's right. And I think if you go
12 back to *Heller*, I mean, *Heller*, it was a case about
13 semiautomatic handguns. It was not a case about some technology
14 of arms that, you know, only fire a few times a minute. We're
15 talking about technology that is not really functionally
16 different from what we're talking about here. It's essentially
17 some of the same firearms, just equipped with some other
18 features in this case.

19 And *Heller* didn't stop to say, well, wait a
20 second, you know, we know the handguns are extremely popular,
21 but we need to stop and analyze just how quickly they fire, just
22 how many rounds they fire, before we can say that this is
23 something that people are entitled to keep and bear.

24 And *Heller* also absolutely acknowledged, I mean,
25 handguns are -- as compared to what we're talking about here, if

1 you look at the statistics on firearms that are used in the
2 commission of violent crimes, it's actually -- you know,
3 handguns dwarf the use of really any type of long guns, but
4 certainly of the type of arms that are prohibited here. Here, I
5 believe it's something in the neighborhood of 1 to 2 percent of
6 your typical violent crime that involves the type of arms that
7 we're talking about here.

8 So the Court -- you know, the Court didn't deny
9 that. The Supreme Court didn't say, no, we think you're wrong,
10 handgun misuse doesn't happen, people don't use these firearms
11 to engage in terrible acts. It just said, we've studied the
12 history and the history tells us that the Second Amendment
13 prioritizes and really preferences the right of law-abiding
14 citizens to keep the arms that they need to protect themselves
15 against the people who would use force against them and their
16 family and those around them and prioritizes that right to
17 self-defense.

18 THE COURT: Let's move in a different direction.
19 An important part of this statute relates to restrictions on
20 what law-abiding citizens can do with the guns they possess in
21 terms of when they leave their own home. And you're challenging
22 the restrictions -- well, some of the restrictions that have
23 been imposed in that regard. So I'd like for you to address
24 that issue if you would.

25 MS. MURPHY: Sure. So, you know, the way this

1 law operates, it imposes -- it essentially creates like a
2 de facto grandfathering clause and says, if you are fortunate
3 enough to already possess these firearms, you can continue to
4 keep them if you comply with certain restrictions. If you don't
5 already have one, you're out of luck. If you do have one, you
6 can continue to keep it, but you can only use it on your own
7 property or the property that belongs to somebody who's given
8 you express permission to do so. And here too, you know, we
9 just don't see a basis to single out these particular arms in
10 this manner and impose these restrictions on them, because we're
11 talking about, again, arms that are commonly possessed by
12 law-abiding citizens for lawful purposes.

13 Now this isn't a case about carry restrictions.
14 There are certainly -- you know, there is law from the Supreme
15 Court about being able to restrict the manner of carry
16 generally. And there are certainly historical bases of
17 particular types of arms, that as a consequence of, say,
18 concealed carry laws, they couldn't be carried outside the home.
19 Predominantly what the state is relying on in trying to
20 demonstrate that this law is permissible is in fact a bunch of
21 concealed carry restrictions and, you know, this would be a
22 different case if we were just talking about restrictions on the
23 manner of carry.

24 THE COURT: Well, the Supreme Court, Alito, in
25 its concurrence said Second Amendment protects the rights of gun

1 carrying citizens to carry outside of their home for
2 self-defense. In reading the statute, it looks to me like,
3 well, you can put one in your car if the ammunition is taken out
4 of it and you've got it locked in some device. But how do you
5 defend yourself outside -- even with a -- how do you defend
6 yourself?

7 MS. MURPHY: That's absolutely right. That's
8 exactly how the law works. There are limited places you're
9 allowed to have it: Your property, someone who gives you
10 express permission, you could take it to the gunsmith to be
11 fixed, and to the range. If you're going to other places, you
12 cannot have access to the firearm. So in that respect, even as
13 to the individuals who get to keep the arms, which is only
14 individuals who already have them, everybody else can't have
15 these arms at all, their ability to utilize them for
16 self-defense, which the Supreme Court has now told us includes
17 both keeping and bearing, has been severely constrained.

18 And that is another aspect of this law in which I
19 think when you're drawing distinctions based on categories of
20 arms, you need -- the state needs to be able to map those
21 distinctions onto the historical tradition test and demonstrate
22 that the restrictions it's imposing are consistent with that
23 tradition, and I just don't think that they can do that here.

24 And, you know, if I may talk for just a moment,
25 some of the history they've put forward, I don't even think on

1 its own terms, the history really gets them there. I mean, the
2 state points to a variety of laws that it says impose severe
3 restrictions on pistols and revolvers and buoy knives. But if
4 you really go through those laws, almost all of them are just
5 restrictions on concealed carry, which again, doesn't keep you
6 from possessing the firearm and doesn't keep you from openly
7 carrying it. And the same is true of the buoy knife
8 restrictions. Most of those were concealed carry restrictions.

9 And as to the handful of laws they identified
10 that did impose broader bans, they're the laws that either --
11 they talk about the 1837 Georgia law multiple times. The
12 Georgia Supreme Court held that law unconstitutional precisely
13 because it didn't leave an outlet to lawfully keep and carry the
14 types of firearms and buoy knives that it prohibited. They
15 point to some very late laws, like the 1891 West Virginia law.
16 The Supreme Court has now on multiple occasions looked at
17 precisely that law and said this law is not consistent with this
18 nation's historical tradition.

19 So really what you find is what we found in both
20 *Heller* and *Bruen*, laws that, you know, come later in time, are
21 out of step with what the Supreme Court has now said is what the
22 Second Amendment means, or laws that were broader and got struck
23 down even by State Supreme Courts back in the day, precisely
24 because they did impinge on the ability to keep and bear arms
25 that were considered to be lawful.

1 So, you know, we don't actually --

2 THE COURT: Three minutes.

3 MS. MURPHY: We don't actually think it's
4 essential to get into any of that history, again, because the
5 test here is a test that focuses on common use, but I don't even
6 think they've got the history right.

7 If I could just quickly say a word, you know,
8 about -- the state has made a big deal about this idea that the
9 test is really what arms are, quote, most useful in military
10 service. I think that's just a very clear misreading of some
11 language in *Heller*. *Heller* was simply talking about how the
12 consequence of the rule that certain arms -- that arms that are
13 highly unusual in society today may well mean that some of the
14 arms that are most useful in military service today can be
15 banned because military service -- military weapons have changed
16 to such a degree that, you know. The most useful military
17 service weapon may well be the M16, which is not something
18 that's -- that's typically possessed by law-abiding citizens for
19 self-defense, but rather is actually highly unusual in society
20 at large. The Court was just discussing the consequence --

21 THE COURT: Well, I mean, today presently
22 standard issued to military personnel is a Mossberg shotgun, a
23 9-millimeter pistol, a .40 caliber pistol, so just the fact that
24 military people might find it useful doesn't mean that
25 law-abiding citizens can't also find it useful.

1 MS. MURPHY: That's exactly right. It's a test
2 that could never work because of course, the history of military
3 and civilian use of firearms is often indiscriminately
4 intertwined. You just can't put -- sure, there are some
5 firearms that -- there are some arms, even if you just think
6 of -- taking out bearable arms, the old fashioned machine guns
7 that required multiple people to move around, some things are
8 just useful in warfare that are not useful at all for
9 self-defense. Many things are interchangeable.

10 And I would just note that if you -- the nail in
11 the coffin to me in most useful in military service test that
12 the Court wants to -- state wants to pull from *Heller* is you
13 won't find that language anywhere in *Bruen*. *Bruen* instead says,
14 five times, that the historical tradition test is what is in
15 common use today.

16 THE COURT: All right. Your time is up. Your
17 45 minutes is up. What I'm going to do, let's take a ten-minute
18 break. When we come back, before we get to the government, if
19 any of the lawyers here wanted to address my questions about the
20 grenade launcher or .50 caliber weapons or anything else I
21 raised that counsel, her clients are not challenging, we'll give
22 you some time. And then I think we'll give you ten minutes,
23 because you're going to be responding to his arguments anyway.

24 So all right. So why don't you guys talk amongst
25 yourselves. We'll see what -- we'll see what's left to argue

1 and then we'll start with the government's position. Thank you.
2 We are adjourned to 2:30.

3 (Recess at 2:17 p.m.)

4 (Return at 2:31 p.m.)

5 THE COURT: Please be seated. Thank you.

6 All right. We're back on the record. It's my
7 understanding that Mr. Maag is going to offer a response to some
8 questions I asked that previous counsel or client was not
9 opposing that particular aspect of the statute.

10 So, Mr. Maag, the floor is yours.

11 MR. MAAG: Thank you, Your Honor.

12 May it please the Court, Counsel.

13 Questions were asked by Your Honor concerning
14 grenade launchers, .50 caliber rifles, and the like. I think
15 it's important to note there's a substantial difference between
16 a grenade launcher, quote-unquote, and an actual grenade. A
17 grenade, people think of it as a fragmentation device, an
18 explosive device, a random device. While perfectly legal at the
19 time of the revolution, has for years been generally not
20 considered an item that has been commercially sought for
21 legitimate private use. What is prohibited by the statute is
22 not something that is designed and used exclusively to launch
23 fragmentation device, shrapnel devices.

24 You of course ordered that the state provide a
25 list of every prohibited item.

1 THE COURT: I did. And I was going to -- would
2 you put up on the screen -- it's page 4 of Document 37.

3 MR. MAAG: That is accurate.

4 THE COURT: There's -- AV -- Tac-D, which they
5 identify as grenade launcher.

6 All right. So the second piece down, there we
7 are. Grenade launcher. Looks like it doesn't launch grenades.
8 To me, it looks like it fires --

9 MR. MAAG: Looks to me like --

10 THE COURT: Smoke or gas or --

11 MR. MAAG: Looks to me like a 37-millimeter flare
12 gun. You can tell that because of the cocking device on the
13 side. And Tac-D sells flare guns, not grenades.

14 THE COURT: All right.

15 MR. MAAG: Be that as it may --

16 THE COURT: Well, what's that say about flare
17 guns? Are these commonly held?

18 MR. MAAG: Flare guns are very commonly held.
19 They're originally -- they're called Very pistols, developed
20 shortly before the Civil War for signaling devices --

21 THE COURT: What do we use them for in
22 self-defense?

23 MR. MAAG: Self-defense or life preservation.
24 They are in fact required by Coast Guard regulations to have
25 signaling devices like this on many boats for calling for help

1 and you're in the wilderness. Most simple way to call for help
2 with such a device was to have one with it if it's attached to
3 your firearm, so much easier to use it.

4 As far as the self-defense use, tear gas,
5 nonlethal. If someone's coming into your home, there's no
6 prohibition on possession of tear gas ammunition, which can be
7 used in a launcher of this type to deter an attack. Same as a
8 nonlethal stun gun. They are commonly held. They are sold over
9 the market. Matter of fact, they're not even regulated
10 federally as firearms. They're considered an accessory.
11 They're expressly excluded from both National Firearms Act and
12 the Gun Control Act of 1968.

13 THE COURT: So this piece of equipment that's
14 depicted in Government's Exhibit 37 identified as a grenade
15 launcher, you're saying that that piece of equipment is most
16 often used for launching flares and the purpose is for safety
17 for someone who may be out hunting and gets lost, if you're on
18 the boat in the middle of Carlyle Lake and you're distressed,
19 you have to fire something to alert the Coast Guard.

20 MR. MAAG: The particular item in that picture,
21 yes. There is a similar device, similar cosmetically appearing
22 device called an M203 grenade launcher that is a 40-millimeter
23 caliber that does, in addition to those same types of gas and
24 flare, can fire what would be available on the military market,
25 fragmentation grenades, but those are not made for 37-millimeter

1 flare devices such as this. This is a rescue and assistance
2 and/or self-defense device that does not involve the use of
3 fragmentation grenades.

4 THE COURT: So are you suggesting that it's
5 unfair to identify that particular piece of equipment as a
6 grenade launcher; it would be more accurately described as a
7 flare launcher?

8 MR. MAAG: Flare launcher or flare gun or Very
9 pistol I suppose is a technical -- V-e-r-y, named after Mr. Very
10 who invented it way back when. Those would be protected under
11 the Second Amendment, as equipment designed and intended for use
12 in legitimate self-defense, commonly owned by millions of
13 Americans. Most larger boat owners will own a flare gun.
14 They're sold at Walmart in 12-gauge caliber, different than
15 shotgun 12-gauge, but they call them 12-gauge. They sell flares
16 at Walmart.

17 THE COURT: What about .50 caliber?

18 MR. MAAG: .50 caliber, keep in mind that at the
19 time of the revolution, the standard bore diameter was
20 .69 inches, sometimes larger, sometimes smaller. But for
21 basically a 12-gauge bore in modern --

22 THE COURT: Well, George Washington carried a
23 56-caliber. He carried 56-caliber pistols.

24 MR. MAAG: Yes, pistols were generally smaller by
25 the time of the Civil War. It was generally 57- or 58-caliber.

1 Basically over time, the bore diameters have tended to shrunk.
2 .50 caliber is simply a bore diameter. It's a scaled up 30-06
3 cartridge. It is commonly used. It was invented in about 1920,
4 1921 by the firearms designer John Browning. And until the last
5 few years, nobody has attempted to ban it. The record shows the
6 state has no evidence of its use in crimes in this state.
7 That's in this record. It is commonly used for recreational --
8 legitimate recreational purposes, and it is potentially a viable
9 self-defense tool in the proper circumstances. It is certainly
10 not an offensive tool. As the Court noted, it's too heavy.
11 Nobody's going to go rob a liquor store with a .50 caliber
12 rifle. Nobody's going to go and commit a mass shooting with
13 a .50 caliber rifle. And again, there's nothing in the record
14 in this case that indicates that it's ever happened, at least in
15 this state.

16 THE COURT: All right. Thank you for addressing
17 those questions, Mr. Maag.

18 MR. MAAG: Thank you, Your Honor.

19 THE COURT: Counsel?

20 MR. OWENS: Your Honor, thank you. And may it
21 please your Honorable Court.

22 My name is Troy Owens I represent the McHenry
23 defendants, State's Attorney Kenneally and Sheriff Tadelman.

24 THE COURT: If you talk slower, that wouldn't
25 offend me.

1 MR. OWENS: Thank you, Judge.

2 THE COURT: I listened to my music too loud, so.

3 MR. OWENS: It's the ten minutes, you know, has
4 me a little anxious.

5 THE COURT: Don't sweat it.

6 MR. OWENS: Thank you, Judge.

7 I think Your Honor knows that we're plaintiffs in
8 the Northern District, Western Division, essentially taken the
9 same position in your Honorable Court as we did in Rockford,
10 that we believe that an injunction, the injunction that the
11 plaintiffs have sought and that we have sought in both courts,
12 should issue and that the declaratory relief action ultimately
13 should be granted in both courts.

14 We believe the injunction in the dec. action
15 should be granted, striking down PICA, not based upon the
16 application of Sections 1983 or 1988, which my clients deny any
17 liability for. We believe the injunction in the dec. action
18 should be granted based upon the analytical trend of Second
19 Amendment litigation and analysis by the US Supreme Court that
20 culminated in *Bruen*.

21 With ten minutes, what I'd like to do is simply
22 distill and bore down on the analytical standard that got us
23 here today that impacts the PICA, Protect Illinois Communities
24 Act, the injunction request, and the filings that were made by
25 the attorney general and the plaintiffs, Judge.

1 Very basically, I just wanted to take the
2 highlights of the main cases as they apply today. I know
3 Your Honor knows that *Heller* essentially dealt with the District
4 of Columbia ban on handguns and that legislation was held to be
5 violative of the Second Amendment. The Court in that case
6 articulated the reason we're all here today. There seems to be
7 no doubt on the basis of both text and history that the Second
8 Amendment conferred an individual right to keep and bear arms,
9 some critical parts of that decision that I think is preserved
10 through *Bruen*.

11 The *Heller* Court cited to *Cruikshank*. In that,
12 the First, Second, and Fourth Amendments to the US Constitution
13 preexist the Constitution and are not reliant upon that
14 instrument for their existence. *Cruikshank* specifically cited
15 to the Declaration of Independence regarding these rights, that
16 these rights, First, Second, and Fourth, were endowed upon us by
17 our creator.

18 Erin brought it up today. The *Heller* Court
19 considered the argument that only weapons that existed at the
20 time of our nation's founding should be considered with the
21 Second Amendment. The Court actually used the word "frivolous"
22 to that argument.

23 And then other critical limits that came out of
24 *Heller* that I think bear upon the Court's decision in *Bruen* and
25 still exist today, is that the weapons, if they are dangerous

1 and unusual, they can be prohibited. But dangerous and unusual.
2 And if the weapons are in common use, they are suitable Second
3 Amendment protections.

4 THE COURT: Even if they're dangerous?

5 MR. OWENS: The key is, dangerous and unusual.
6 All firearms are dangerous. Everybody here would acknowledge
7 that you wouldn't purchase a firearm because it is benign or
8 it's not harmful. But the key is, "and unusual." Now I'll get
9 to that, Your Honor, but the answer is yes. Common and
10 dangerous, but not unusual -- or and unusual.

11 *McDonald* essentially gave us the key language
12 that it's clear that the framers and ratifiers of the Fourteenth
13 Amendment counted the Second Amendment as fundamental rights
14 necessary to preserve our system of liberty and made this Second
15 Amendment applicable on the states, which is why we're arguing
16 today about whether or not the Protect Illinois Communities Act
17 is -- should be stricken down.

18 The question became ultimately that, how do we
19 analyze these Second Amendment questions? The Seventh Circuit
20 had a couple of challenges, chances in *Friedman* and in *Wilson*.
21 The reason I bring this up is, I believe the attorney general's
22 filings before you is essentially, for lack of a better --
23 pardon the pun -- a shot at a target that's not *Bruen*. It's a
24 shot at a target that's essentially *Friedman* and *Wilson*.

25 *Friedman* gave us no, you know, ends-means strict

1 scrutiny, intermediate scrutiny analysis, but specifically asked
2 the question, do the regulation -- does the regulation in
3 question ban weapons that were in common use at the time of the
4 ratification of the Constitution, or does the regulation bear
5 upon some reasonable relationship to preserve the efficiency of
6 a well-regulated militia?

7 *Wilson* gave us similar analysis. That analysis
8 ultimately asked the Court threshold questions. Is the
9 restricted activity protected by the Second Amendment? If so,
10 does the strength of the government's reasons justify the
11 restriction at issue. And then you get these questions that I
12 think bear upon their filings and the experts that they've used.
13 Does the regulation allow citizens to retain the right of
14 self-defense? What is the severity of the law's burden on that
15 right? Is there a substantial and important government interest
16 that the law serves? They gave us examples: Reducing dangerous
17 crime, making public feel safe. Judge, I know you know all
18 this. The reason I bring it up, I believe *Bruen* completely
19 changed the paradigm and directly impacts how this law should be
20 enforced.

21 Erin brought it up. Essentially the government's
22 burden is, do modern historical regulations impose a comparable
23 burden on the right of armed self-defense, and is the burden
24 comparably justified? That last one almost sounds like an
25 ends-means analysis. However, the Court asked us to ask the

1 question, if the regulatory burden is comparably justified,
2 keyword being "comparably." Is the historical analog and the
3 legislation at issue, are these comparably justified, comparing
4 one to the other? And I would say, based upon that analysis,
5 Judge, the answer for *Bruen* is, there's just simply no way. If
6 the analysis was *Wilson* and *Friedman*, the government's filings
7 based upon the experts they've provided and the arguments
8 they've made, might make PICA a sustainable statute. Same thing
9 with the experts they provided to you. But based upon the
10 standard in *Bruen*, Judge, I think I respectfully submit that
11 PICA should fall.

12 The historical analog, I respectfully submit, as
13 it pertains to the Protect Illinois Communities Act, there is
14 literally none. Taking a look at the actual strictures
15 contained within the legislation, this is effectively a ban on
16 virtually every semiautomatic rifle that can be constructed.
17 Unlike any other statute, there are 177 specifically enumerated
18 AR platform semiautomatic rifles that the day before PICA went
19 into effect, now cannot be purchased. Not only those 177
20 weapons, but all copies, duplicates, and variants. It's
21 effectively every semiautomatic rifle that is manufactured
22 today.

23 I'd ask the Court to take note of our filing.
24 We've provided some research. There are 20 percent of the
25 firearms that exist today, and there's 24 million of these in

1 circulation as we stand in this courtroom today. The day after
2 all these people who hold these weapons, essentially -- they'd
3 be illegal if they were purchased today.

4 THE COURT: One minute.

5 MR. OWENS: One minute. Let me just say this
6 then, Judge. Let me break it down. *Bruen*, *Heller*, and
7 *Cruikshank* stand for the proposition that the First, Second, and
8 Fourth Amendments preexisted the Constitution and are not
9 reliant upon that text. I'd ask the Court to use this
10 opportunity to look at this legislation through the prism of the
11 protectiveness by which those Courts articulated that standard.
12 The rights in question were not the right from the governor or
13 Illinois legislature, the Congress, the Supreme Court, or the
14 Constitution, or even the blood of patriots that heroically
15 secured them for us. They were given to us by our creator,
16 according to our Supreme Court.

17 That's the last thing I'd ask, is viewed from
18 that prism, please don't let something so temporary as the
19 Illinois legislature's legislation, destroy something that the
20 law considers so timeless. I'd ask you to grant this
21 injunction, Judge.

22 THE COURT: Thank you.

23 MR. OWENS: Thank you.

24 THE COURT: All right. Do you want a little time
25 before, or are you ready to go now?

1 MR. WELLS: I'll probably need just a second to
2 get set up, to make sure it's working. I think maybe five
3 minutes.

4 THE COURT: All right. Let's take a brief five
5 minute recess.

6 (Recess at 2:47 p.m.)

7 (Return at 2:53 p.m.)

8 THE COURT: Are we ready?

9 MR. WELLS: I am, Your Honor.

10 THE COURT: Fire away. No pun intended.

11 MR. WELLS: So thank you, Your Honor.

12 Christopher Wells on behalf of the state defendants, the
13 attorney general, the governor, and the director of the Illinois
14 State Police.

15 THE COURT: Can you speak up a little louder or
16 pull the microphone towards you? Thank you.

17 MR. WELLS: Is that better?

18 THE COURT: That's better.

19 MR. WELLS: Your Honor, the reason we're here
20 talking about the Constitution is because it endures. It allows
21 each generation to address pressing social problems through our
22 elected representatives.

23 The Protect Illinois Communities Act addresses a
24 recent and acute social problem, mass shootings, perpetrated by
25 lone gunmen carrying AR-15s and large capacity magazines. In

1 particular, on July 4th, 2022, a lone gunman used an AR-15 and
2 30-round magazines to kill seven people and wound 83 others in
3 one minute at a July 4th parade in Highland Park, Illinois. As
4 Your Honor's remarks acknowledged at the outset, we're talking
5 about individual people here. And I think frankly, the
6 statistics that I could read off to you about the number of
7 first graders that were killed at Sandy Hook, the number of
8 people that were killed in Orlando, Florida, in Las Vegas
9 Nevada, and El Paso, Texas, in Uvalde, Texas, with an AR-15 and
10 a 30-round magazine, I could quote statistics, Your Honor. I
11 could list the number of deaths, but that would be a disservice
12 because it conceals the fact that we're talking about
13 individuals who were killed.

14 So faced with this undeniable pattern of mass
15 shootings perpetrated by lone individuals with AR-15s in
16 particular and 30-round magazines, the Illinois legislature made
17 a choice to take AR-15s and other similar weapons and 30-round
18 magazines off the civilian market in Illinois. Plaintiffs' case
19 is that that's not possible because of the Second Amendment.
20 More specifically, they say that they've sold so many AR-15s and
21 large capacity magazines at this point that they're untouchable,
22 they can't be regulated, they can't be taken off the civilian
23 market. That's their case. All we have to do is count AR-15s
24 and large capacity magazines.

25 Your Honor, we don't think that's the

1 constitutional standard. We don't think that's what *Bruen* said.
2 We don't think that's what *Heller* said. I'm going to spend a
3 lot of time today, Your Honor, talking about what the
4 constitutional standard actually is. And as Your Honor already
5 heard from the argument, we have different views about what the
6 two prongs of *Bruen* require. We believe that the relevant
7 question in the text prong is whether or not arms protected are
8 arms in common use for self-defense. *Heller* and *Bruen* both
9 stated that formulation. Arms are arms in common use for
10 self-defense.

11 I'm going to spend quite a bit of time today
12 talking about *Heller* in particular, Your Honor, because I think
13 what *Heller* tells us about how you read the text, how you read
14 constitutional text, you read it in light of the purpose. What
15 were the framers trying to accomplish through the text?

16 With respect to history, Plaintiffs' view, we
17 don't even get to history. They say, all we have to do is count
18 AR-15s. That is their case. We've sold 24 million of them.
19 We've heard that quoted many times. They say, these are arms,
20 they're common, that means they're not unusual, that means
21 there's no historical tradition.

22 With all due respect, it doesn't come down to
23 whether or not there's just been a lot of AR-15s sold, frankly,
24 in the last 20 years, because that's when they've become
25 popular, since the expiration of the 2004 Federal Assault

1 Weapons Ban.

2 Your Honor, I'm going to address the text in the
3 first sentence. Plaintiffs' view of text, we heard from them,
4 all that you have to show, all that they have to show, is that
5 these are bearable arms. That's it. Is it something that you
6 can take into your hands to cast or strike another? We think
7 that is overly simplistic. We don't think that is what the
8 Supreme Court said in *Heller* or *Bruen*. The Supreme Court
9 interpreted the textual analysis to be a question of, what arms
10 are in common use for self-defense.

11 There are nuclear missiles, Your Honor, nuclear
12 arms that we in common parlance refer to. We have -- used to
13 have at least -- treaties with the Russians, the Strategic Arms
14 Limitation Treaties. Those aren't arms protected by the Second
15 Amendment. Same thing with tanks, same thing with fighter jets.
16 Plaintiffs will say, oh, well, those are not bearable arms.
17 Yes, they're not bearable arms, but stinger missiles, javelin
18 missiles can be carried by a single individual. We're equipping
19 the Ukrainians with them right now. They are being used on the
20 battlefield in Ukraine. They're bearable arms.

21 Plaintiffs' view of the standard is that an
22 individual could come into court and say, I would like to
23 acquire a javelin missile. That's an arm. I've carried my
24 plain text burden. You can carry it. It's bearable. And then
25 the burden shifts to the government. I don't think that is

1 consistent with the reading of *Heller*, how *Heller* read the
2 Second Amendment, or how *Bruen* reads it.

3 THE COURT: Well, let me ask you, so the text of
4 the Second Amendment refers to well-regulated militia, and some
5 people have kind of ignored that. But doesn't that suggest that
6 even at that time, what the people who adopted the Constitution
7 were saying is, you get to have arms, at least gives you a
8 fighting chance if you were in a militia and we had to beat back
9 the redcoats or somebody else. And so it's not -- doesn't
10 suggest that you can have a Red Ryder BB gun and that's good
11 enough for you. Isn't there some suggestion when you read it in
12 that context that suggests that even at that time, they thought
13 the people are going to have arms, a right to carry arms, that
14 could have some relevant military use if they were pressed in
15 the service in the militia?

16 MR. WELLS: Certainly, Your Honor. I don't think
17 our position -- and I heard counsel suggest that somehow it's a
18 pure military use test. That's not what we've put forward. It
19 is the fact that some weapons really are -- have characteristics
20 that undeniably push them way into the military zone, stinger
21 missiles, things of that category. It's ultimately about
22 attributes and use.

23 THE COURT: Okay.

24 MR. WELLS: What are the attributes of these
25 particular weapons, and how are they used --

1 THE COURT: I didn't mean to take you off your --
2 let's get back to your prepared --

3 MR. WELLS: No, Your Honor, I honestly welcome
4 the questions. I do think a lot of the questions that
5 Your Honor had will come up naturally in the course of this.
6 But I want to talk about *Heller* and I want to talk about
7 *Heller's* textual interpretation, how it approaches text.

8 *Heller* acknowledges that the right's not
9 unlimited. We know that. We know it's not a right to keep and
10 carry any weapon whatsoever. So how does *Heller* make the
11 determination of what types of weapons are protected by the text
12 of the Second Amendment and which are not?

13 THE COURT: So what you're referring to in *Heller*
14 is, the Second Amendment does not enshrine the right to carry
15 any weapon whatsoever in any manner whatsoever and for whatever
16 purpose.

17 MR. WELLS: Correct.

18 THE COURT: That was in *Bruen*, but there may be
19 in *Heller*. That's really the language you're referring to, it's
20 not unlimited?

21 MR. WELLS: That is correct, Your Honor, and I've
22 got the text right there on the screen.

23 THE COURT: Okay.

24 MR. WELLS: And I think it -- where it comes up
25 again too I believe is in Justice Kavanaugh's concurrence.

1 THE COURT: All right.

2 MR. WELLS: And I think it's in the majority as
3 well. There's an acknowledgment that, look, it doesn't mean
4 everything; right? Everything that can be conceivably be a
5 bearable arm.

6 How does *Heller* make this determination? And
7 *Heller* really, in a way that *Bruen* is not, is a case about
8 weapon type. By the time you get to *Bruen*, there was no dispute
9 that the Court had held that handguns were the quintessential
10 self-defense weapon. Same thing in *McDonald*. Handgun case, but
11 it was clear at that point that handguns were protected. *Heller*
12 engages with handguns relative to other types of arms in a way
13 that the successor cases do not.

14 So what does *Heller* say about that typology, and
15 how does it distinguish between what is in fact covered and
16 what's not? Your Honor alluded to it. What is the essential
17 issue in *Heller*, whether or not -- how you read the text of the
18 Second Amendment, a well-regulated militia being necessary to
19 the security of the free state. The right of the people to keep
20 and bear arms shall not be infringed. What does the militia
21 reference mean? Does it mean anything? How relevant is it to
22 the right that is protected?

23 As Your Honor knows, *Heller* concluded it's an
24 individual right. It's not connected to militia service. And
25 in fact, it really -- and I'm not using this in the means-ends

1 scrutiny way that other courts have. It's a means to an end.
2 It protects a means, particular instruments, arms, in service of
3 the end of self-defense, self-defense being a preexisting right,
4 as the Court understood it, that frankly, what didn't even need
5 to be codified. It was just there. It was a right of English
6 men going back centuries.

7 So instead, what *Heller* does is it looks at the
8 text and says, this militia reference, it doesn't capture it
9 all, it actually looks to the underlying purpose, and determines
10 that self-defense, even though it's not textually referenced in
11 the Second Amendment, is central to how we understand it. And
12 because handguns in particular were the quintessential
13 self-defense weapon in *Heller*'s view, an absolute prohibition of
14 handguns held and used for self-defense in the home was
15 unconstitutional. So what do we know about handguns in
16 particular from *Heller*?

17 THE COURT: They have pistol grips.

18 MR. WELLS: They do have pistol grips, Your
19 Honor. They're also readily accessible in an emergency, as the
20 *Heller* majority acknowledged. You can keep them in your bedside
21 table. They're harder to be wrestled away by an attacker because
22 the attacker can't grab the barrel as easily. They're wider and
23 easier to use than a long gun and you can point one with one
24 hand and dial 911 with the other. Those attributes mattered to
25 how the Court understood the special status of a handgun. I

1 would suggest that most of those attributes do not apply to the
2 AR-15s that we're talking about in this case.

3 So even before the *Heller* Court reaches handguns,
4 it discusses three different categories of weapons that at least
5 strongly suggests are not protected, one of which is the
6 short-barreled shotgun from *Miller*, 1939 case, 20th century
7 case, Your Honor, addressing a 20th century regulation, the 1934
8 National Firearms Act. So what did the Supreme Court -- how did
9 it interpret *Miller*? *Miller* mentions the militia rationale.
10 That was how *Miller* approached the analysis. Supreme Court
11 says, yeah, that's probably not wrong. They're not looking at
12 it in that way. But it's clear they're protecting the result of
13 that case. So it reinterprets *Miller* in a way that suggests
14 that there are only certain types of weapons that are protected
15 by the Second Amendment, only certain weapon types. So
16 short-barreled shotguns, look, those are not protected. Why?
17 Because they have a connection to criminal violence. They were
18 being used in particularly concerning forms of criminal violence
19 in the prohibition era, as Your Honor alluded to.

20 Briefly, one point about what's essential and
21 what's not essential in a firearm. A barrel is an essential
22 component of a firearm. The length of the barrel could be
23 regulated, however. So when we talk about large capacity
24 magazines, a magazine -- a bullet, yes, a bullet may be
25 essential. Something to hold bullets may be essential. Does it

1 have to be large capacity magazine? I don't think there is a
2 constitutional protection for a large capacity magazine. Some
3 magazine, perhaps. A large capacity magazine, I would suggest
4 no. How do we know that? We know that because short-barreled
5 shotguns, which I would note are not semiautomatic weapons, can
6 be heavily regulated under federal law because they have certain
7 attributes that make them prone to criminal misuse.

8 Another type of weapon, Your Honor alluded to it
9 earlier, the Thompson submachine gun. Incredible rate of fire,
10 used in the St. Valentine's Day massacre, used in many other
11 massacres. Frankly, though, as Your Honor may have seen from
12 some of our historical submissions, were Thompson submachine
13 guns the leading murder weapon of the day? No, they weren't.
14 Other weapons were being used. But they were being used in a
15 way that terrified the public, really high profile, well
16 reported-on incidents that led to the regulation. This idea
17 that just because a particular weapon isn't the leading cause of
18 murder, that somehow we can't touch it, that's not how we do
19 Second Amendment analysis.

20 Your Honor, the last category of weapon that
21 *Heller* at least alludes to and strongly suggests that it can be
22 banned probably because it's also automatic and also because
23 it's a military weapon built for the battlefield, is M16 rifles
24 and the like. And again, this comes back to textual analysis,
25 Your Honor. How does this reference to the M16 arise in the

1 *Heller* discussion? The dissent by Justice Stevens is heavily
2 arguing that you have to talk about militia weapons. It's got
3 to be connected to the militia. It's a collective right based
4 on militia service. And frankly, Justice Scalia suggests that
5 there's a growing disconnect or the degree of fit is
6 significantly less than it used to be because he presumes that
7 M16s, which are the standard issue US Army weapon for soldiers
8 at that time, they presumptively can be regulated. Does the
9 Court hold that definitively? No, but it certainly gives us
10 quite a bit of insight that the M16 in particular is something
11 that could be banned from the civilian market.

12 So at the end of the day, there are four weapon
13 types that are addressed in *Heller*: One, the handgun,
14 quintessential self-defense weapon, close -- based on its
15 attributes and its use, there's a close nexus to the purpose of
16 self-defense, which the Court understands to be the central
17 component of the Second Amendment.

18 Short-barreled shotguns, despite having their
19 barrel regulated, an essential part of a firearm, they were not
20 typically possessed by law-abiding citizens for lawful purposes.
21 *Heller* accepts that *Miller* -- while the rationale may have been
22 inconsistent with *Heller*'s view about the individual nature of
23 the right protected, that the outcome was right.

24 Machine guns, again, Justice Scalia is startled
25 at the dissent suggestion that machine guns would be beyond the

1 reach of regulation. M16, similar implication.

2 THE COURT: And that's M15 as it's equipped by
3 the US military? Not just something that looks like an M15?
4 I'm sorry, M16, but the M16 as equipped by the military, which
5 is different than what's being sold to the civilians? You would
6 agree with that?

7 MR. WELLS: So I don't know that -- I would agree
8 that -- the main difference is automatic fire. I think we
9 acknowledge that. M16 is select fire rifle. It can engage in
10 automatic fire, three-shot bursts, semiautomatic fire.

11 THE COURT: Okay.

12 MR. WELLS: But I think our experts and I think
13 even Plaintiffs would suggest that first of all, the M16 was
14 originally called the AR-15, then when it became selected by the
15 US Army, they renamed it the M16, with that "M" denomination for
16 "Military."

17 THE COURT: For "Military," mm-hmm.

18 MR. WELLS: So there is a significant degree of
19 overlap between the M16 and the AR-15. The
20 semiautomatic-automatic distinction is a distinction. I would
21 suggest that in practice, we've seen that there's not a lot of
22 functional difference in how AR-15s are being used in mass
23 shootings in terms of the rate of fire, the number of people
24 killed. If one soldier accomplished -- if one soldier were able
25 to perpetrate as many killings on the battlefield, I mean,

1 that -- that is a very substantial body count that is associated
2 with, again, a semiautomatic weapon.

3 I would also note in terms of the military
4 training, this is one of the things that we point out in our
5 materials, the army manual from I believe 2008 suggested that
6 you're supposed to use M16s primarily in semiautomatic mode
7 because it makes you more effective on the battlefield. While
8 yes, automatic fire can be used for suppression and other
9 purposes and sometimes is necessary in battle, in our view, the
10 distinction is decreasingly significant, particularly in the
11 context of why the act was enacted, which is addressing mass
12 shootings.

13 So what does *Heller* tell us? It tells us that
14 the purpose of the right is relevant to how we interpret the
15 text. Well-regulated militia, decreasingly significant. Why?
16 Because the right codified is a preexisting right to
17 self-defense, and so we read the text in light of that. So what
18 arms are protected? Arms for self-defense. Other types of
19 weapons that have specific attributes that aren't suitable for
20 self-defense and are in fact being used or misused in the
21 criminal context, those weapons not protected.

22 *McDonald*, again, reaffirms that self-defense is
23 the central purpose here. *Heller*, that's really what *Heller* is
24 motivated by. What is the nature of the underlying right? It's
25 the right to keep and bear arms for the purpose of self-defense.

1 THE COURT: So who gets to choose what weapon a
2 law-abiding citizen selects to defend themselves?

3 MR. WELLS: So, Your Honor, I would suggest that
4 again, it's a combination of attributes and particularly
5 experience in use. I don't think that when machine guns were
6 outlawed, that the question was whether or not the market should
7 dictate whether or not those types of weapons are protected by
8 the Second Amendment. We've never done --

9 THE COURT: Let me -- here's what I'm getting at.
10 And what made me think about this is that, you know, on YouTube,
11 I saw this clip that somebody gets an alert on their cell phone,
12 they have a Ring camera, and there's four men that come up, big
13 burly guys. They come up on the porch of this house, got masks
14 on, they start pulling out guns. And I thought of this
15 scenario.

16 What if you were -- what if you were away on a
17 trip and this comes up on your cell phone? And then your wife
18 calls and says, Oh my God, there's men outside. I think they're
19 going to attack. Yeah, I can see it on the Ring telephone -- I
20 can see it on my cell phone. And she says, I'm at the gun safe.
21 I can pull the pump action shotgun that has three rounds, a gun
22 that your experts are suggesting is the gold standard for
23 self-defense in the home, or I can pull the AR-15 and I can
24 insert the five-round clip that's loaded or I can insert the
25 30-round clip that's loaded, or I should say magazine.

1 Don't you say, grab the AR-15 and take the
2 30-round magazine because there's four of them and the shotgun,
3 while that's ideal, there's only three rounds in it, honey, and
4 you're going to be panicked and you can't assume that every shot
5 you get off is going to be a lethal shot at first. Wouldn't it
6 be reasonable under that -- as the story turned out, there was
7 some elder gentleman there with a shotgun and when they kicked
8 the door open, he opened fire and it scared them off. But what
9 if it didn't scare them off?

10 MR. WELLS: So, Your Honor --

11 THE COURT: Who gets to decide -- does the
12 government get to say, no, ma'am, I'm sorry, you got to go with
13 the -- you got to go with the shotgun that has only three rounds
14 in it. I know you're scared. You may not be used to how to
15 load it, but God speed.

16 MR. WELLS: So, Your Honor, I appreciate that
17 question. I would suggest that, think about how we regulate
18 many dangerous things in society or things that aren't
19 inherently dangerous but actually harm people. Baby cribs.
20 Baby cribs have lots -- have a lawful purpose, right? You can
21 keep a baby crib in your home. But when baby cribs have a
22 certain design that ends up killing lots of kids, what happens?
23 They get regulated. In some instances, they even get taken off
24 the market. It's Plaintiffs' job to show that this particular
25 product, which unlike baby cribs, is actually designed to kill

1 people, that it is in a specific category that puts it beyond
2 regulation. It is -- we're talking about --

3 THE COURT: Baby cribs are not specifically
4 protected by the Constitution. That's what's the difference. I
5 understand -- I understand the analogy, but --

6 MR. WELLS: Well, Your Honor, and I would say,
7 look, your scenario is -- obviously any person would want to
8 protect their loved one, and I understand that that motivates a
9 lot of people to purchase firearms. You know, I'm not
10 originally from Illinois. I'm from North Carolina. My
11 grandfathers, West Virginia, Southwestern Virginia, firearms
12 owners. I'm not -- this isn't lost on me why people are
13 motivated to purchase any firearms.

14 Your scenario, though, I would say, Your Honor,
15 that's one specific scenario. I think if you look at actual
16 use, and this comes from Plaintiffs' own evidence, you look at
17 the English survey, which I think has some flaws that I'm -- can
18 highlight. But if you look at that survey, what are people
19 choosing in actual self-defense scenarios? 66 percent of the
20 time, under the people that were surveyed, they said they were
21 choosing handguns. Second choice, shotguns. Third choice,
22 13 percent, only 13 percent rifles. What type of rifle, what
23 level of specificity, we don't know.

24 THE COURT: So let me build on that scenario.
25 Let's say guy takes his wife and teenage daughter to a firing

1 range and tells them, I want you to learn how to fire this pump
2 action shotgun in case you need to use it in self-defense. This
3 I think is your best choice. Double lot ammunition. Let's say
4 it holds five rounds. And they fire it. I don't like it, Dad.
5 Well, why not? Because of the -- because of the significant
6 recoil. And it's loud. I'm afraid of this thing.

7 Here, try this AR-15. Shoots a few rounds.
8 This, I like better. I'm more comfortable with it. It's not as
9 heavy. It doesn't have the recoil. I've got this little thing
10 at the end that shoots a green light or a red light so I can see
11 what I'm aiming at. I want this one. Does she get the right to
12 make that choice? Or do I say, survey says, your best bet is
13 this shotgun?

14 MR. WELLS: Well --

15 THE COURT: In a situation where they have to
16 succeed at defending themselves, does the government get to say,
17 no, we're going to put you at a disadvantage because we prefer
18 you use the shotgun as opposed to a rifle that we don't like?

19 MR. WELLS: Your Honor, we're going to talk about
20 the government.

21 THE COURT: Yeah, we are. We're talking about
22 the Constitution.

23 MR. WELLS: I'd like to be clear. I think who
24 makes the choice are the elected representatives of the people,
25 Your Honor. I think yes, is there tension that some people may

1 not like that particular choice? That's the nature of
2 self-government. That's the nature of self-government in a
3 democratic society. I believe that the legislature is entitled
4 to make the choice that in the aggregate, the amount of harm --

5 THE COURT: Is that an infringement?

6 MR. WELLS: Excuse me?

7 THE COURT: Is that an infringement on the right
8 to bear arms, shall not be infringed?

9 MR. WELLS: I would suggest that it's not,
10 because while we can identify hypothetical individual scenarios,
11 when you actually look at really the choices that people are
12 being -- are making in realtime across the board, according to
13 Plaintiffs' own data, 87 percent of people are choosing a
14 shotgun or handgun.

15 THE COURT: Well, and, you know, statistics are
16 what they are, but in the pleading that was filed by Patrick
17 Kenneally, he cited a study that said, according to United
18 States Justice Department, Bureau of Justice Statistics,
19 household members are present for almost a third of all
20 burglaries and become victims of violent crime in more than a
21 quarter of those cases. Studies on frequency of defensive
22 firearm use in United States have determined that there are up
23 to 2.5 million instances each year in which a civilian uses a
24 firearm for home protection. All right. 18 percent of
25 2.5 million, oh, 15 percent, oh, 10 percent. That's -- there's

1 still thousands and thousands of people using --

2 MR. WELLS: Well, Your Honor --

3 THE COURT: -- these kind of guns for
4 self-defense in their home.

5 MR. WELLS: And frankly, there are and will
6 continue to be many types of weapons that are lawful in
7 Illinois.

8 THE COURT: Okay.

9 MR. WELLS: And these particular plaintiffs are
10 not having their AR-15s taken away from them. They're allowed
11 to continue possessing them. Are there people who will not be
12 able to acquire AR-15s and they might have otherwise acquired
13 them? Yes. Yes. Does that mean that this particular item -- I
14 think at the end of the day, Your Honor, a lot of the arguments
15 that could be made about some of these scenarios that we're
16 talking about could also be made about automatic weapons. You
17 want the most fire power, you're going to be nervous, you need
18 to be able to -- you might miss, you need to be able to fire as
19 much as you need as quickly as you need. I don't think
20 Plaintiffs have a good answer for how we even draw the
21 distinction.

22 If we're going to accept, and I think Ms. Murphy
23 accepts but maybe not all the plaintiffs accept, that fully
24 automatic firearms can be regulated in a manner that takes them
25 out of the civilian market, how can we not make the same

1 arguments about number of shots, accuracy, being nervous, that
2 would also then sweep in automatic weapons?

3 So while, Your Honor, I concede, it is a
4 line-drawing challenge, and I think the question here is whether
5 or not Plaintiffs have established that these particular weapons
6 are in common use for self-defense. And I think the answer to
7 that question is that they've not shown that. So let's --

8 THE COURT: Well, are we just looking at
9 self-defense in the home, or are we looking at self-defense
10 anywhere, that somebody might determine, offensively or
11 defensively, they've got to use arms to protect themselves?

12 MR. WELLS: So I think, one, we've suggested, and
13 I don't think I've heard a response from Plaintiffs, these
14 particular weapons -- AR-15s, Illinois is a concealed carry
15 state, concealed carry for handguns. I don't think they've
16 specifically identified places where they intend to carry them,
17 but they have standing to challenge that they --

18 THE COURT: Well, there's all kinds of handguns
19 you're restricting by this as well, aren't you? Any handgun
20 that has a clip or magazine that holds more than, what, ten
21 rounds or 15 rounds?

22 MR. WELLS: 15 rounds, Your Honor.

23 THE COURT: All right. So if you have a valid
24 concealed carry permit, are you able to carry your gun on you
25 outside your home? You don't have to go through all the pesky

1 ammunition and has to be separated from the gun and has to be
2 put in a certain container out of your reach?

3 MR. WELLS: Yes, Your Honor, you can carry a
4 15-round magazine in a semiautomatic handgun, same handgun that
5 Chicago police officers carry every day, that law enforcement
6 around the state carry every day. You can continue to carry
7 those.

8 THE COURT: If you have concealed carry.

9 MR. WELLS: If you have a concealed carry permit.

10 THE COURT: Do you know what the turnaround is
11 if -- to get your concealed carry permit when you file an
12 application?

13 MR. WELLS: Not as quick as it should be.

14 THE COURT: Mine's been pending since September.

15 MR. WELLS: I understand that, Your Honor.

16 THE COURT: Yeah.

17 MR. WELLS: And frankly, I -- having --
18 representing the state, we get sued in both directions. We get
19 sued if it's not happening fast enough and we get sued because
20 we don't regulate guns enough.

21 THE COURT: But you're going to represent to this
22 Court that the state isn't intentionally slow-walking a lawful
23 citizen's applications for concealed carry permits because they
24 just don't want people having guns?

25 MR. WELLS: Your Honor, I have no knowledge

1 indicating that there's any slow-walking going on. Do I
2 communicate with ISP about their application process in a way
3 that gives me enough vantage to know whether that's going on? I
4 don't have that perspective, but I'm certainly not aware of
5 anything.

6 THE COURT: All right. All right. I'll let you
7 get back to -- I took you away from where you were.

8 MR. WELLS: No, it's -- I appreciate the
9 questions, Your Honor.

10 And again, I think it is important to talk about
11 what Plaintiffs' evidence of common use for self-defense is.
12 And it comes down to sales. Ms. Murphy I think alluded to the
13 fact that some people have criticized that logic. Well, yes,
14 the Seventh Circuit has criticized that logic.

15 It says -- in the *Friedman* case, the Seventh
16 Circuit said relying on how common a weapon is would be circular
17 to boot. Machine guns aren't commonly owned for lawful purposes
18 today because they are illegal. Semiautomatic weapons with
19 large capacity magazines are owned more commonly because until
20 recently in some jurisdictions, they have been illegal. It
21 would be absurd to say that the reason why a particular weapon
22 can be banned is that there is a statute banning it so that it
23 isn't commonly owned.

24 First Circuit said, we agree, just counting sales
25 is illogical. And I think the evidence in this case, Your

1 Honor, shows why it's illogical. Look at the history of AR-15
2 sales. 1994, AR-15s were banned under federal law, Federal
3 Assault Weapons Ban. Ten years the ban was in place. When did
4 these 24.6 million sales occur? 88 percent after the expiration
5 of the ban.

6 Let's pick another point in time, since 2012.
7 What happened in 2012? Sandy Hook massacre with an AR-15 and
8 large capacity magazine. Big spike the year after. 64 percent
9 of all AR-15s, according to Plaintiffs' own data, have been
10 purchased after 2012 Sandy Hook massacre.

11 So I'm not going to speculate about --

12 THE COURT: This graph, though, is just showing
13 purchases of guns that are on the AR-15 platform?

14 MR. WELLS: So what this shows is modern sporting
15 rifles, which is the industry's terminology for AR-15 style
16 rifles. It is a category that is -- that's where they get the
17 24 -- and I should say, it's import and production, so it's
18 National Shooting Sports Foundation and ATF data showing each
19 year how many are sold. And so it shows the sales trajectory
20 year over year. Right? And then the 64 percent is what
21 percentage of the 24 million for that period of time.

22 Your Honor, ultimately, you know, there was some
23 discussion about when -- what is the threshold; right? Is there
24 some numerical threshold? Is it the 200,000 from the Caetano
25 concurrence of two justices? It's two justices. Your Honor

1 understands that there's got to be majority. And I think the
2 *Delaware* case that we submitted for Your Honor's consideration
3 acknowledges, there are a 176,000 legally owned civilian machine
4 guns.

5 THE COURT: That's right.

6 MR. WELLS: Does that --

7 THE COURT: You have to get a license from the
8 feds, but.

9 MR. WELLS: True. But does that mean that those
10 are in common use? And people perhaps purchase them for
11 self-defense. Does that mean that machine gun regulations are
12 somehow invalid because --

13 THE COURT: No, but every one that's purchased
14 those, in addition to having a F0ID card, isn't there a much
15 more rigorous background check and licensing procedure? So
16 presumably there are a lot of hurdles that an individual has to
17 vault over before they can get that license.

18 MR. WELLS: That's true. It was also true of the
19 Federal Assault Weapons Ban in 1994. I mean, we used the term
20 "ban," but these -- "ban" is perhaps too stringent whenever
21 we're talking about it, because there's always exceptions.
22 There's always intricacies to the law. But was the Federal
23 Assault Weapons Ban in 1994 unconstitutional from the outset?
24 Are there now people who are convicted for possession of weapons
25 prohibited by that between 1994 and 2004 that we're now going to

1 have to revisit their convictions? Is that what -- is that what
2 we're going to have to do? I would suggest that the answer to
3 that question is, no, because in 1994, Congress could regulate
4 assault weapons in the way that they did. And now, in 2023, the
5 Illinois legislature can also regulate assault weapons in the
6 way that it has.

7 And, Your Honor, I -- again, this question about
8 sales and what people are choosing, this is the success of the
9 AR-15 -- you know, Plaintiffs, we talk about timing, when did
10 the timing of this happen. I don't think it's really disputed
11 that the AR-15 was developed in the late 1950s. It became the
12 M16. The semiautomatic civilian available version has been on
13 the market for a while. It wasn't being chosen in great numbers
14 again until after 2004, the time the Federal Assault Weapons Ban
15 was enacted in 1994. It wasn't selling in the way that it's
16 selling now. What's changed?

17 A successful marketing campaign. The firearms
18 industry has pushed these particular weapons that -- in ways
19 that frankly allude to their military service, and some of the
20 more extreme examples allude to the fact that they've been used
21 in mass shootings. So what -- should we really be relying for
22 constitutional purposes on the success or failure of a marketing
23 campaign, of whether or not a particular item has been sold?

24 We point to two data points, Your Honor, that we
25 know establish a common use threshold. 50 to 60 percent of

1 households in Colonial America and around the time of the
2 revolution and the enshrinement of the Second Amendment, 50 to
3 60 percent of folks owned a musket or a fowling piece. This is
4 2 percent of the population that owns a modern sporting rifle,
5 which is the AR-15 family of rifles.

6 Well below that threshold, as counsel alluded to,
7 50 percent of handguns -- 50 percent of the 461.9 million
8 handguns, 461.9 million firearms in circulation, 50 percent of
9 them are handguns. That's 230 million. That's nearly ten times
10 the 24.6 million that Plaintiffs have --

11 THE COURT: How many -- do you know how many of
12 those handguns would be rendered illegal under this statute?

13 MR. WELLS: So I would suggest that Plaintiffs
14 have not put forward much evidence at all that -- why they've
15 brought this lawsuit is about the handguns that would be
16 regulated. I do not believe that the handguns with the
17 attributes that are regulated in the act are that prevalent.
18 They are -- the evidence simply is not there. The evidence that
19 Plaintiffs have put forward is about the AR-15 rifle. That
20 is -- we would not be here talking about 24.6 million if it
21 weren't for the AR-15.

22 So while yes, there are handguns frankly that get
23 converted to essentially function like an AR-15 rifle, those are
24 covered by the act, but the --

25 THE COURT: Well, I'm concerned about all these

1 add-ons, that -- would you put up page 4? Let's talk about some
2 of these. I know -- I see you looking at your watch, and I'm
3 going to give you some additional time. We're going to have to
4 switch out court reporters at ten to 4, so that will give us a
5 good break to -- all right. We are having technical
6 difficulties. Happens everywhere. All right. The top one.
7 You have to pull it down a little bit, Julie.

8 A flash suppressor. An otherwise legal gun under
9 the statute, it's equipped with a flash suppressor can make it
10 illegal. What is it about a flash suppressor that changes the
11 dynamics such that it would move from a legal to an illegal
12 firearm with just that add-on?

13 MR. WELLS: So, Your Honor, I would -- I would
14 make a point in the first instance, that the weapons that we're
15 talking about, the 24.6 million, most of them have more than one
16 feature that's on the list. The way to think about the features
17 list, Your Honor, is the model list tells us about the existing
18 market. The features list is about ways in which firearms
19 manufacturers, as they did during the 1994 to 2004 Federal
20 Assault Weapons Ban, were able to circumvent the particular
21 terms of that statute.

22 So what about a flash suppressor in particular?

23 THE COURT: Yeah.

24 MR. WELLS: It stabilizes the firearm during
25 periods of rapid fire. Okay? It prevents muzzle blindness,

1 flash blindness from -- during periods of rapid fire.

2 THE COURT: Or during period of a single fire,
3 pull of the trigger. So if someone's being attacked in their
4 home, it's night, and they fire their gun and it has a flash
5 suppressor, it reduces the amount of interference with their
6 vision from the flash, does it not?

7 MR. WELLS: So yes, Your Honor.

8 THE COURT: All right. Let's move on to the next
9 one. Go to page -- let's go to page 5. Show the lower gun. So
10 here's a pistol with a protruding grip. Now suppose you have --
11 many people who are called upon to defend themselves are
12 elderly. They're people who are disabilities. And suppose if
13 they hold a pistol with one hand, because of early stages of
14 Parkinson's or something, they're shaky. But with that, they're
15 able to stabilize it more and it makes it safer for them to use
16 and more accurate for them to use. Would that not be a fair
17 assessment, at least for someone that might be suffering with
18 that disability?

19 MR. WELLS: So, Your Honor, I -- with respect
20 to -- again, the particular features, we're not here today
21 because there are --

22 THE COURT: I'm here today because of that. I'm
23 really looking at -- it looks like all kinds of safety features
24 are made illegal by this statute in an effort to make every
25 possible gun that's out there, most guns out there, get you

1 tripped up on it. The thumb hole -- I mean, the thumb stock,
2 that doesn't make the bullets any more lethal. It doesn't make
3 the gunfire any faster, but it makes it easier for the user to
4 aim it and control the weapon, does it not?

5 The same could be said -- you know, even the arm
6 brace, you know, if you have an elderly person that wants to use
7 the handgun, but again, maybe they have diabetic neuropathy or
8 condition that millions of elderly people have, the arm brace,
9 they like it because they feel more comfortable, they feel
10 steadier. The arm brace doesn't make the gunfire any faster or
11 the bullets impact at a higher velocity. And you're making it
12 illegal and you're making it illegal for people that really may
13 benefit from using it in a self-defense scenario.

14 MR. WELLS: So --

15 THE COURT: Isn't that true?

16 MR. WELLS: There are many different firearms
17 that will continue to be on the market that are legal and that
18 have attributes that are well suited for self-defense.
19 Handguns, again, that police officers carry, Your Honor, are not
20 impacted by this statute. And again, the weapons that are being
21 sold, the weapons that are --

22 THE COURT: But maybe the police officers have
23 passed their fitness training. They're probably not elderly.
24 All right? If they have a disability that hinders their ability
25 to use the issued firearms, they're probably taken out of duty.

1 So to say, look, there's a strap and fit 25-year-old police
2 officer who can use these weapons perfectly, great, he doesn't
3 need the arm brace or the second grip. But what about the
4 82-year-old lawful citizen trying to save himself at his home?

5 MR. WELLS: Your Honor, I believe the reason that
6 the particular features that are identified are on the list is
7 because they facilitate two things, sustained accuracy during
8 periods of rapid fire and concealability. Those features are
9 associated with mass shootings and other criminal cases.

10 A lot of the same arguments, Your Honor, could be
11 made about the short-barreled shotguns that we know from *Miller*
12 and *Heller* are -- those regulations are permissible. Right? Is
13 it -- an elderly person, a short barreled shotgun may be
14 lighter, it may be easier to hold up. There may be aspects of
15 that weapon that make it preferable in that circumstance. But
16 based on actual experience and practice, how have they been
17 commonly used? They've been commonly used in a manner that's
18 associated with unlawful activity.

19 THE COURT: All right. Four years ago, the
20 Illinois government passed Gun Trafficking Information Act and
21 it requires the state police or Illinois law enforcement to
22 detail key information related to firearms used in the
23 commission of crimes, including police reports, the number of
24 people killed in these crimes, where they occurred, and where
25 the firearms originated.

1 And I'm looking at an article from the
2 Pantagraph. That's not Bloomington. Maybe it's Bloomington.
3 May 18th, 2023, that -- where a named party in this case said
4 the lack of -- that -- here's this quote. In the four years
5 since the law was signed, the state's top law enforcement
6 agency, still in the dark, telling lawmakers in February report
7 that the, quote, lack of centralized and uniform data collection
8 tool for use by all Illinois law enforcement agency has made
9 collection and reporting of all the mandated information
10 unattainable.

11 So your own law enforcement isn't able to come up
12 with this information for me to look at in determining this.
13 Your legislators aren't able to come up with this important
14 information to look at, because the Illinois government says
15 that such information is simply unattainable. Why would I go
16 out on a limb on somebody's constitutional rights to say, well,
17 I'm going to take -- I'm going to take Illinois's word for it
18 nonetheless, even though they say that this relevant data that I
19 should be looking at, as they try to gather it, it's simply
20 unattainable?

21 MR. WELLS: Your Honor, I would suggest that,
22 there's a bit of an irony here because there has been a
23 substantial push by the firearms industry and by the firearms
24 lobby to limit information about firearms, how many there are,
25 how many are used; right? That's been a concerted effort. So I

1 would not --

2 THE COURT: Well, how are you able to tell me,
3 people aren't using these guns in self-defense or they're not
4 worthwhile in self-defense or there's not enough elderly people
5 or people with disabilities having tried to defend themselves
6 with arms that they can't handle? How can you -- how can you
7 tell me -- I mean, what can you show me that allows me to say,
8 yeah, I think that's a perfectly legitimate argument?

9 MR. WELLS: Your Honor --

10 THE COURT: And I have to consider people who
11 have disabilities. I have to consider all Illinois residents.

12 MR. WELLS: Your Honor, I think the Illinois
13 legislature also has to consider all Illinois residents and
14 they're elected by the residents of Illinois to make some of
15 these difficult judgments. And I concede, they are difficult
16 judgments. The thing --

17 THE COURT: Let me ask you -- and we're going to
18 switch and I'll give you some more time. But the telescoping
19 shoulder -- so let's say you have in a household, Dad is 6'3",
20 Mom is 5'1", and you want both to be able to use an AR-15 or an
21 otherwise lawful gun, but to have the shoulder stock being
22 adjustable makes it easier for both of them to use, doesn't it?

23 MR. WELLS: Well, Your Honor, it would still have
24 to fit within the other requirements, which are that it would be
25 a semiautomatic rifle. If you had a pump action adjustable -- a

1 pump action shotgun, for instance, that had an adjustable stock,
2 that would not be restricted by the act and that would be a
3 weapon that could be purchased and used and adjusted to family
4 members.

5 THE COURT: All right. But my 5'1" tall wife
6 doesn't want to use the pump action shotgun because of the
7 recoil. If an AR -- all right. You're banning all ARs. Let's
8 just say, even back to the ones that are kind of grandfathered
9 in, doesn't it make sense for them to have adjustable stocks, so
10 that more than one person can use it comfortably and the more
11 comfortable they are, the more likely they are to be accurate in
12 shooting?

13 MR. WELLS: So there are certainly benefits to an
14 adjustable stock attached to a particular weapon, whether
15 that -- whether or not that means that AR-15s, which have many,
16 again, Your Honor, many of the features on this list, we
17 wouldn't be here if this -- if this weren't about the
18 combination of features that are incorporated in the AR-15 and
19 how it is being used and how other similar AR -- AR-style
20 rifles, the AK-47, they don't want to hear -- talk much about
21 the AK-47, which is also regulated, semiautomatic form as well.

22 Your Honor, there are line-drawing challenges to
23 be sure. The question, though, is whether or not the particular
24 arms that Plaintiffs are seeking to acquire and sell and which
25 they've put forward evidence about, are arms in common use for

1 self-defense. The ones that they're specifically focusing on,
2 that's -- that's the evidence that they've put forward. Are
3 those particular arms in common use for self-defense?

4 THE COURT: All right. Let's break here, because
5 we have to switch court reporters. Let's take a seven-minute,
6 eight-minute break and we'll come back.

7 (Recess at 3:51 p.m.)

8
9

10 **COURT REPORTER'S CERTIFICATE**

11 I certify that the foregoing is a correct
12 transcript from the record of proceedings in the above-entitled
13 matter.

14 Dated this 13th day of April, 2023

15 /s/ Hannah Jagler

16
17 Hannah Jagler, RMR, CRR, FCRR
18 Official Court Reporter
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